(2)

Supreme Court, U.S.
FILED
JAN 4 1996
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No. 95-882

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY, individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

vs.

TREE FARM DEVELOPMENT CORPORATION;
EMORY O. WILLIAMS, JR.; THE ESTATE OF GEORGE
G. PHILLIPS, JR.; E. D. "BOB" PIERCE; and THE
ESTATE OF ABRAHAM L. PIERCE,

Respondents.

On Petition For Writ Of Certiorari
To The District Court Of Appeal, First District
For The State Of Florida

BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

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January 4, 1996

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42 pp

QUESTIONS PRESENTED FOR REVIEW

In accordance with Rule 15.2, Rules of the Supreme Court of the United States, Respondents, Tree Farm Development Corporation (Tree Farm) and E. D. "Bob" Pierce (Pierce) respectfully submit that the following questions more accurately reflect the issues which would be reviewed by this Court should certiorari be granted than do the questions posed by the Petitioner.

A. WHETHER THE SUPREME COURT OF THE STATE OF FLORIDA, AS A MATTER OF FLORIDA CONSTITUTIONAL LAW, HAD JURISDICTION TO REVIEW A *PER CURIAM* AFFIRMANCE BY THE FIRST DISTRICT COURT OF APPEAL OF THE ORDER OF THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA, GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS ON AN ISSUE OF STATE COMMON LAW.

B. WHETHER THE DECISION OF THE SUPREME COURT OF THE STATE OF FLORIDA THAT IT LACKED JURISDICTION OVER PETITIONER'S PETITION FOR REVIEW OF THE *PER CURIAM* AFFIRMANCE BY THE FIRST DISTRICT COURT OF APPEAL OF THE ORDER OF THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA, GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON AN ISSUE OF STATE COMMON LAW VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER EITHER THE FLORIDA CONSTITUTION OR THE CONSTITUTION OF THE UNITED STATES.

QUESTIONS PRESENTED FOR REVIEW – Continued

C. WHETHER THE ORDER OF THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA, GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND ENTERING FINAL JUDGMENT IN FAVOR OF RESPONDENTS DEPRIVED PETITIONER OF HIS RIGHT TO TRIAL BY JURY AND RIGHT OF ACCESS TO THE COURTS UNDER THE FLORIDA CONSTITUTION.

D. WHETHER THE CONDUCT OF THE DEFENSE ATTORNEY IN ALLEGEDLY MAKING MISREPRESENTATIONS OF FACT DURING THE SUMMARY JUDGMENT PROCEEDINGS BELOW AND THE CONDUCT OF THE TRIAL COURT JUDGE IN ALLEGEDLY APPLYING THE MISREPRESENTATIONS IN A MANNER PREJUDICIAL TOWARDS PETITIONER WHEN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER EITHER THE FLORIDA CONSTITUTION OR THE CONSTITUTION OF THE UNITED STATES.

E. WHETHER THE ORDER OF THE CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA, TRANSFERRING PETITIONER'S DECLARATORY JUDGMENT ACTION FROM LEON COUNTY, FLORIDA, TO ESCAMBIA COUNTY, FLORIDA, BASED ON THE STATE'S LOCAL

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RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

JURISDICTION

Petitioner's Motion For Rehearing in the First District Court of Appeal was denied on April 24, 1995 (R.App. 3). Petitioner apparently seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) and Rule 10(b) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Section 1, Amendment XIV to the United States Constitution, sets forth the "due process" rights of the citizens of the United States. It reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the Constitution of the State of Florida (1968), as amended, sets forth the "due process" rights of citizens of the State of Florida. It reads as follows:

> Section 9. Due Process. – No person shall be deprived of life, liberty or property without due

process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Article V, Section 3(b) of the Constitution of the State of Florida (1968), as amended, sets forth the jurisdiction of the Supreme Court of the State of Florida. Its provisions are set forth below:

(b) JURISDICTION. – The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of the district courts of appeals declaring invalid a state statute of a provision of the state constitution.

(2) When provided by general law, shall hear appeals and final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review actions of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question

certified by it to be of great public importance, or that is certified by it to be in direct conflict with the decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect upon the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article V, Section 4(b) of the Constitution of the State of Florida (1968), as amended, sets forth the jurisdiction of the Districts Courts of Appeal of the State of Florida. Its provisions are set forth below:

(b) JURISDICTION. –

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all of the issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

Article I, Section 21 of the Constitution of the State of Florida (1968), as amended, sets forth Florida citizens' right of access to courts and provides as follows:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article I, Section 22 of the Constitution of the State of Florida (1968), as amended, sets forth Florida citizens' right of trial by jury and provides as follows:

> The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Rule 9.330(a), Florida Rules of Appellate Procedure governs the time for filing motions for rehearing of an appellate court decision and provides as follows:

> **(a) Time for Filing: Contents; Reply**. A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. . . .

STATEMENT OF THE CASE

The Petition for Writ of Certiorari does not contain a Statement of the Case. Accordingly, Respondents respectfully submit a brief description of the material proceedings which resulted in this Petition for Certiorari.

On June 3, 1994, the Circuit Court in and for Escambia County, Florida, entered an order granting Respondents' motion for summary judgment and quieting title to certain real property situate in Escambia County, Florida,

to the Respondents (R.App. 12). Final judgment was then entered in favor of Respondents (R.App. 5). The essence of the case involved the propriety of a merger between Petitioner's former corporation and the Respondents which resulted in the Respondents acquiring title to the subject property. Petitioner objected to the merger on the grounds of fraud and deceit and insisted title to the subject real property never lawfully passed to Respondents.[1]

Petitioner appealed the circuit court's decision to the First District Court of Appeal, and on March 10, 1995, the District Court of Appeal entered a *per curiam* (without opinion) affirmance of the circuit court's ruling (R.App. 4). On March 29, 1995, Petitioner filed a motion for rehearing in the District Court of Appeal, which was denied by the court on April 24, 1995 (R.App. 3). Petitioner then petitioned the Supreme Court of Florida for review of the District Court of Appeal's *per curiam* decision, and on May 3, 1995, the Supreme Court of Florida dismissed the petition (R.App. 2). Petitioner then filed a motion for reinstatement of the appeal, which was denied by the Supreme Court of Florida on September 6, 1995 (R.App. 1). On December 5, 1995, Petitioner filed the instant Petition For Writ of Certiorari in this Court.

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[1] The facts of the case are set forth more fully in the circuit court's Order (R.App. 13).

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED, AND THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 2101(c) AND RULE 13 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

Title 28, United States Code, § 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States require that petitions for writs of certiorari to review a judgment entered by a state court of last resort must be filed with the Clerk of the Court within 90 days of the entry of judgment. The question then becomes one of determining precisely what "judgment" is sought to be reviewed.

Respondents Tree Farm and Pierce respectfully submit that the operative order in this case is the District Court of Appeal's March 10, 1995, *per curiam* affirmance of the circuit court's order and entry of final judgment in favor of Respondents on their motion for summary judgment (R.App. 4). Pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, Petitioner's time for filing a motion for rehearing of the District Court of Appeal's *per curiam* decision expired on March 25, 1995. Petitioner did not file his motion for rehearing until March 29, 1995, and the motion, which was untimely, was denied by the District Court of Appeal on April 24, 1995 (R.App. 3). Petitioner then petitioned the Supreme Court of Florida for review, and on May 3, 1995, the Supreme Court of Florida dismissed Petitioner's petition, noting the absence of jurisdiction over the appeal (R.App. 2).

Petitioner then filed a motion for reinstatement, which was denied by the Supreme Court of Florida on September 6, 1995, with an award of attorney's fees in Respondents' favor (R.App. 1). Petitioner filed his Petition For Writ of Certiorari in this Court on December 5, 1995, identifying the Supreme Court of Florida's September 6, 1995, Order as the order appealed from.

The Florida Constitution, Article V, Section 3(b), was amended in 1980, limiting the appellate jurisdiction of the Florida Supreme Court. The 1980 Amendment made the district courts of appeal the "court of last resort" for most cases. *Cf.*, Fla. Const. Art. V, Section 4(b) (1968), as amended. This limited jurisdiction of the Florida Supreme Court has been previously recognized by this Court. *See Palmore v. Sidoti*, 466 U.S. 429, 431 (1984); *Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970). Further, the Florida Supreme Court has held that it does not have jurisdiction to review a "per curiam affirmed" decision (without opinion) of a district court of appeal. *Dodi Publishing Company v. Editorial America, S. A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). This lack of jurisdiction was also recognized in this very case by the Supreme Court of Florida in its order of May 3, 1995, dismissing Petitioner's petition for review of the District Court of Appeal's *per curiam* decision (R.App. 2).

Consequently, in this case, the District Court of Appeal was the "court of last resort" for the Petitioner, and Petitioner had, at the very latest, 90 days from the date of its April 24, 1995, Order denying his motion for

rehearing in which to file his Petition For Writ of Certiorari in this Court.[2] Petitioner did not file his Petition in this Court until 125 days after the District Court of Appeal's April 24, 1995, Order, and, therefore, the Petition For Writ of Certiorari in this case is untimely and should be dismissed for want of jurisdiction.

II.

THE PETITIONER HAS FAILED TO PRESENT ANY SUBSTANTIAL FEDERAL QUESTION RAISED IN THE PROCEEDINGS BELOW AND DECIDED BY THE STATE COURTS WHICH WOULD WARRANT THE EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION.

As an initial matter, Rule 14(1)(g)(i) of the Rules of the Supreme Court of the United States requires a Petitioner seeking to invoke the Court's powers of discretionary review over a state court judgment to specify in the Statement of the Case

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary

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[2] Respondents submit that because Petitioner's motion for rehearing in the District Court of Appeal was untimely, the actual time for filing the Petition for Writ of Certiorari in this Court commenced on March 10, 1995, the date on which the District Court of Appeal entered its *per curiam* affirmance of the circuit court's order.

> thereof, with specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

Sup. Ct. R. 14(1)(g)(i). The Petitioner in this case has made no effort whatsoever to comply with Rule 14, and instead has submitted a rambling recitation of numerous state and federal constitutional and statutory provisions with no identifiable connection to the proceedings below.

Notwithstanding Petitioner's failure to comply with the technical dictates of Rule 14, the Petition for Writ of Certiorari is fundamentally flawed and fails to confer jurisdiction on this Court. Rule 10 of the Rules of the Supreme Court of the United States, requires a "compelling reason" for the invocation of the Court's certiorari jurisdiction. Sup. Ct. R. 10. The existence of a federal question is a jurisdictional prerequisite to the granting of a petition for certiorari. *Herb v. Pitcairn*, 324 U.S. 117, 1125-26 (1945). Further, this Court has recognized that the principal purpose of certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 111 S. Ct. 1854, 114 L.Ed.2d 385 (1991).

Not only must the issue at stake before this Court involve federal law, it must also have been properly raised in a prior state court proceeding. This Court has long held that the federal question must have been raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Beck v. Washington*, 369 U.S. 541,

550-554 (1962); *Godchaux Company v. Estopinal*, 251 U.S. 179, 181 (1919). Absent this having occurred, this Court is without jurisdiction to review the state court judgment. *See Crowell v. Randell*, 10 Pet. 368, 391-98 (1836). *See also, Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). If "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). If the highest state court is silent on the asserted federal question, the Court will assume, unless it can be affirmatively shown otherwise, that the state court's silence is due to the procedural deficiency of the assertion of the federal question. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 309 (1903). Further, this Court has held that a petitioner may very well have waived a federal issue that has not been asserted and argued before the highest state court. *Beck v. Washington*, 369 U.S. at 553.

This Court has also held in the past that merely referring to "due process of law" is insufficient to properly frame a federal question for the Court's exercise of jurisdiction. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). *See also Brady v. Maryland*, 373 U.S. 83, 91 (1963) (opinion of White, J.); *Minnesota v. National Tea Company*, 309 U.S. 551, 559 (1940) (Hughes, C. J. dissenting). Finally, if the petitioner does not raise the federal question until the Petition for Writ of Certiorari, as has happened in this case, the assertion of the federal question comes too late. *See White River Lumber Company v. Arkansas, Ex Rel. Applegate,*

279 U.S. 692, 700 (1929); *Whitney v. California*, 274 U.S. 357, 362-63 (1927); *Hiawassee River Power Company v. Carolina-Tennessee Power Company*, 252 U.S. 341, 344 (1920); *Thomas v. Iowa*, 209 U.S. 258 (1908).

Petitioner argues in his petition that he has been deprived of his constitutional rights by the actions of the attorneys and judicial officers in the state court proceedings below. More specifically, he claims that he has been denied his right to a jury trial and right of access to the courts based on the Respondents' attorney's alleged misrepresentation of facts to the trial court during the summary judgment proceedings below, and the trial court's alleged acceptance and application of the allegedly misstated facts in a manner prejudicial towards him when it granted Respondents' motion for summary judgment. Petitioner also argues that the Florida Supreme Court's failure to exercise jurisdiction over his appeal from the District Court of Appeal violated his constitutional right of access to the courts. Finally, Petitioner continues to argue, as he did in his previous Petition For Writ of Certiorari filed in this Court in 1992,[3] that his due process rights were violated by an order entered early on in this case by the Circuit Court in and for Leon County, Florida, which transferred his declaratory judgment action from Leon County, Florida to Escambia County, Florida pursuant to the state's Local Action Rule.

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[3] This petition was denied by this Court on October 13, 1992 (R.App. 18).

First, with the possible exception of Petitioner's lingering due process claim,[4] no federal claim has been raised in any of the state court proceedings below. Accordingly, there is no state court decision on a federal question currently facing this Court. Next, even if the Petitioner had properly presented and argued his claims as federal questions in the state courts below, which Respondents submit he did not, the issues implicated in the instant case are not federal; they are rooted exclusively in state law.

Specifically, Petitioner's due process claim arises solely in the context of the circuit court's construction of the Florida "Local Action Rule." *See Georgia Casualty Company v. O'Donnell*, 109 Fla. 290, 147 So. 267 (1933). Federal concerns are in no way implicated by this decision. Likewise, Petitioner's present claims of having been deprived of his right to a trial by a jury and his right of access to the courts by the decisions of the Florida courts below are based exclusively on state law. The Petition expressly refers to Sections 22 and 23 of the Florida Constitution for the assertion of these rights, and Petitioner's oblique reference to 42 U.S.C. § 1983 cannot alter the basic state law character of these claims. *See* Art. 1, Sections 22 and 23 of the Constitution of the State of Florida (1968), as amended. Consequently, none of the issues raised by Petitioner in the instant petition encompasses a "compelling" consideration for the exercise of this Court's certiorari jurisdiction.

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[4] It is unclear whether Petitioner bases his due process argument on Article 1, Section 9 of the Florida Constitution or the Fourteenth Amendment to the United States Constitution.

Moreover, any inquiry by this Court into the circuit court's order granting Respondents' motion for summary judgment would necessarily involve review of the trial court's finding that no genuine issue of material fact existed, a rare function of this Court's discretionary powers. *See* Sup. Ct. R. 10 (1995); *NLRB v. Hendricks County Rural Electric Co.*, 454 U.S. 170, 176 n.8 (1981); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In summary, Petitioner has failed to timely and properly raise any federal question at any level of the state court proceedings below, let alone a substantial one. Accordingly, there has not been a decision on an important question of federal law by any court in this case that warrants review by this Court.

CONCLUSION

This Court should not grant the Petition For Writ of Certiorari in this case for two reasons. First, and foremost, the Court lacks jurisdiction over the Petition based on the Petitioner's untimely filing. Second, Petitioner has failed to raise an important federal question decided by a court below which warrants review and consideration by this Court. Based on the foregoing, Respondents Tree Farm and Pierce respectfully submit that this Court should decline to exercise its discretionary power to

review the state court's decision in this case by writ of certiorari.

Respectfully submitted,

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904/434-9200
Counsel for Respondents

No. 95-882

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY, individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

vs.

TREE FARM DEVELOPMENT CORPORATION;
EMORY O. WILLIAMS, JR.; THE ESTATE OF GEORGE
G. PHILLIPS, JR.; E. D. "BOB" PIERCE; and THE
ESTATE OF ABRAHAM L. PIERCE,

Respondents.

On Petition For Writ Of Certiorari
To The District Court Of Appeal, First District
For The State Of Florida

APPENDIX TO BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 6, 1995

JACK KELLY, Appellant, v. TREE FARM DEVELOPMENT CORPORATION, etc., Appellee.	*	CASE NO. 85,600 District Court of Appeal, 1st District – No. 94-2167

Appellant's Motion for Reinstatement filed in the above cause is hereby denied.

Appellant's Motion to Strike Motion is hereby denied.

Appellee's Motion for Attorney's Fees is granted; and said attorney is hereby allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney by appellant after final disposition of this cause. SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur

A True Copy

TEST: (SEAL)

By: /s/ T. Carroll
Deputy Clerk

Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Ernie Lee Magaha, Clerk
Hon. Joseph O. Tarbuck, Judge

Mr. Jack David Kelly
Mr. Stephen Moorhead
Mr. E. D. "Bob" Pierce
Mr. Carl R. Pennington, Jr.
Mr. Emory O. Williams
Mr. Phillip A. Bates

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 3, 1995

JACK KELLY,	**	
Appellant/Petitioner,	**	CASE NO. 85,600
v.	**	DISTRICT COURT
TREE FARM DEVELOPMENT CORPORATION, ETC.,	** **	OF APPEAL, 1ST DISTRICT – NO. 94-2167
Appellee/Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed and no motion for rehearing will be entertained by the Court.

It appearing to the Court that the District Court of Appeal, First District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

A True Copy

TEST: (SEAL)

By: /s/ Sid J. White
Sid J. White
Clerk Supreme Court

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Ernie Lee Magaha, Clerk
Hon. Joseph O. Tarbuck, Judge

Mr. Jack David Kelly
Mr. Stephen Moorhead
Mr. E. D. "Bob" Pierce
Mr. Carl R. Pennington, Jr.
Mr. Emory O. Williams
Mr. Phillip A. Bates

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

April 24, 1995

CASE NO.: 94-02167

L.T. CASE NO. 91-0309

Jack Kelly v. Tree Farm Development Corporation

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, filed March 29, 1995, is DENIED.

Motion to accept, filed March 29, 1995, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler (SEAL)
JON S. WHEELER, CLERK

By: /s/ Sondra Joyner
Deputy Clerk

Jack D. Kelly

Copies:

Sherry Grant Hall
Philip A. Bates

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

JACK KELLY,

Appellant,

v.

TREE FARM DEVELOPMENT CORPORATION, a foreign corporation,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-2167

Opinion filed March 10, 1995.

An appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge.

Sherry Grant Hall of The Hall Law Firm, P.A., Destin, for Appellant.

Philip A. Bates of Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, Pensacola, for Appellee.

PER CURIAM.

AFFIRMED.

WEBSTER, MICKLE and BENTON, JJ., CONCUR.

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

TREE FARM DEVELOPMENT CORPORATION,

Plaintiff,

v.

JACK D. KELLY,

Defendant.

Case No. 93-181 and No. 91-4119 consolidated into CASE. NO. 91-0309-CA-01 Division "C"

FINAL JUDGMENT

THIS CAUSE having come on to [sic] heard before the Court upon the Motion of Tree Farm Development Corporation for Summary Final Judgment, and the Court having reviewed all of the pleadings and papers in this case, which includes Case No. 93-181 in the Circuit Court in and for Escambia County, Florida, transferred from the Circuit Court, Second Judicial Circuit in and for Leon County, Florida, and consolidated into Case No. 91-0309 in the Circuit Court in and for Escambia County, Florida; as well as Case No. 91-4119 in the Circuit Court in and for Escambia County, Florida, consolidated into this Case No. 91-0309, and the proofs submitted by the Plaintiff, the discovery and other papers in the consolidated court file, and having heard the argument of counsel and being otherwise fully advised in the premises, finds and decides that there is no genuine issue of material fact and the Plaintiff is entitled to judgment as a matter of law. It is thereupon

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. The title of the Plaintiff, Tree Farm Development Corporation, to the following described real property in Escambia County, Florida:

Parcel 1:

Commencing at the Northwest corner of Section 9, Township 1 South, Range 31 West, Escambia County, Florida; thence run South along the West line of said Section 9 for 89.95 feet to the South right of way line of State Highway No. 10 (200' R/W Nine Mile Road) and the Point of Beginning: Thence continue South and along the West line of Section 9 for 2544.21 feet; thence 90°18'33" left for 2653.89 feet; thence 89°43'42" left for 2548.40 feet to the South right of way line of State Highway No. 10; thence 90°21'15" and along said right of way line for 2651.91 feet to the Point of Beginning, containing 155.08 acres.

Parcel 2:

Commencing at the Southwest corner of Section 9, Township 1 South, Range 31 West, Escambia County, Florida; thence run East along the South line of Section 9 for 2655.94 feet; thence 89°51'33" left for 2640.65 feet; thence 90°16'18" left for 2653.89 feet to the West line of Section 9; thence 89°41'27" left and along the West line of said Section 9 for 2634.16 feet to the Point of Beginning, containing 160.74 acres.

Parcel 3:

Commencing at the Northwest corner or Section 16, Township 1 South, Range 31 West, Escambia

County, Florida; thence run South along the West line of said Section 16 for 1980.82 feet; thence 91°09'39" left for 1318.90 feet; thence 90°12'59" right for 672.70 feet; thence 90°02'54" left for 1337.33 feet; thence 89°46'43" left for 2640.31 feet to the North line of Section 16; thence 90°08'27" left and along the North line of said Section 16 for 2655.94 feet to the Point of Beginning, containing 141.31 acres.

Parcel 4-A

Commencing at the Southeast corner of Section 8, Township 1 South, Range 31 West, Escambia County, Florida; thence run West along the South line of said Section 8 for 1992.16 feet; thence 90°27'09" right for 2639.37 feet; thence 89°41'50" right for 1941.42 feet to the East line of Section 8, thence 90°17'24" right and along the East line of said Section 8 for 2634.16 feet to the Point of Beginning, containing 120.57 acres.

Parcel 4-B

Commencing at the Southeast corner of Section 8, Township 1 South, Range 31 West, Escambia County, Florida; thence run West along the South line of said Section 8 for 1992.16 feet to the Point of Beginning: Thence continue West along same line for 1992.16 feet; thence 90°27'55" right for 2644.59 feet; thence 89°41'04" right for 1991.42 feet; thence 90°18'10" right for 2639.37 feet to the Point of Beginning, containing 120.81 acres.

Parcel 5:

Commencing at the Northwest corner of Section 9, Township 1 South, Range 31 West, Escambia County, Florida; thence run South along the East line of said Section 9 for 94.46 feet to the South

right of way line of State Highway No. 10 (200' R/W Nine Mile Road) and the Point of Beginning: Thence continue South and along the East line of said Section 9 for 2552.68 feet; thence 89°45'56" right for 2653.88 feet; thence 90°16'18" right for 2548.40 feet to the South right of way line of State Highway No. 10; thence 89°38'45" right and along said right of way line for 2651.90 feet to the Point of Beginning, containing 155.31 acres.

Parcel 6:

All of Rosemont Subdivision, a subdivision of a portion of Section 9, Township 1 South, Range 31 West, according to plat recorded in Plat Book 1 at Page 4 of the public records of Escambia County, Florida;

AND

All of first Addition to Rosemont Subdivision, a subdivision of a portion of Section 9, Township 1 South, Range 31 West, according to plat recorded in Plat Book 1 at Page 9 of the public records of Escambia County, Florida.

Parcel 7:

Commencing at the Northeast corner of Section 16, Township 1 South, Range 31 West, Escambia County, Florida; thence run South along the East line of said Section 16 for 2643.09 feet; thence 90°00'59" right for 2667.38 feet; thence 90°13'17" right for 2640.31 feet; thence 89°51'33" right for 2655.93 feet to the Point of Beginning, containing 161.42 acres.

Parcel 8:

Commencing at the Northeast corner of Section 16, Township 1 South, Range 31 West, Escambia

> County, Florida; thence run South along the East line of said Section 16 for 2643.09 feet; thence 90°00'59" right for 1333.69 feet to the Point of Beginning; thence continue along same line for 2671.02 feet; thence 89°57'06" left for 1312.16 feet; thence 1°26'06" right for 351.44 feet to the Northerly right of way line of U. S. Highway No. 90 (200' R/W Mobile Highway); thence 62°07'00" left and along said right of way for 524.35 feet; thence 119°01'00" left for 605.29 feet; thence 90°09'00" right for 870.75 feet; thence 89°28'58" left for 645.85 feet; thence 89°46'53" right for 1335.40 feet; thence 89°54'34" left for 660.43 feet to the Point of Beginning, containing 65.18 acres.

is a good title as against the claims or purported claims of the Defendant, Jack D. Kelly, and all other parties claiming by, through, under, or against him; and all other parties having or claiming to have any right, title, or interest in that property; and of all persons claiming by, through, or under Defendant since the filing of the Notice of Lis Pendens; and those claims or purported claims are canceled; and title to the property is forever quieted in the Plaintiff, Tree Farm Development Corporation.

2. All of the claims, counterclaims, and defenses of the Defendant, Jack D. Kelly, in each of the several consolidated cases, shall be and the same are hereby dismissed with prejudice.

3. This Court reserves jurisdiction for purposes of awarding costs and such attorneys' fees as may be appropriate.

DONE AND ORDERED in chambers at Pensacola, Escambia County, Florida, this 16th day of June, 1994.

/s/ Joseph Q. Tarbuck
JOSEPH Q. TARBUCK
CIRCUIT COURT JUDGE

Conformed Copy to:

(6) Philip A. Bates
P.O. Box 13010
Pensacola, FL 32501

John Kevin Griffin
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605 Suwannee Street
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Carl R. Pennington
3375 Capitol Circle
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Tallahassee, FL 32317

E.D. "Bob" Pierce
1401 North "B" Street
Pensacola, FL

Plaintiff's address:

Tree Farm Development Corporation
23 Lexington Avenue
Cambridge, MA 02138

Defendant's address:

Jack D. Kelly
3331 Summit Blvd.
Apt. 87
Pensacola, FL 3250322

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

TREE FARM DEVELOPMENT
CORPORATION, a foreign
corporation,

Plaintiff,

vs. CASE NO. 91-0309

JACK KELLY,

Defendant.
_____ /

**ORDER ON PLAINTIFF'S MOTION
FOR SUMMARY FINAL JUDGMENT**

Maple Leaf Development Corporation, hereinafter referred to as "Maple Leaf" was incorporated as a Florida corporation in April of 1970. On July 1, 1971, Maple Leaf acquired title to approximately 1080.42 acres as well as Rosemont Subdivision and the First Addition thereto.

On or about December 3, 1971, Maple Leaf entered into an agreement entitled "Agreement and Plan of Reorganization" with Tree Farm Development Corporation, a Delaware corporation, hereinafter referred to as "Tree Farm" and five individuals, Jack D. Kelly, Abraham L. Pierce, Emory O. Williams, Jr., George G. Phillips, Jr., and E. D. Bob Pierce. The agreement basically provides for the merger of Maple Leaf into Tree Farm. About January 18, 1972, Tree Farm and Maple Leaf entered into an Agreement of Merger. Item Four of the Agreement of Merger provides as follows:

> This Agreement and Plan of Merger shall be filed with the Secretary of State of Delaware and

> with the Department of State of Florida and the merger provided for herein shall become effective on the date on which the last act required to complete said merger under the respective laws of Delaware and Florida is performed.

The Agreement of Merger was signed by the President of each entity, Kelly signing as President of Maple Leaf, and each was attested to by each Secretary. The Agreement of Merger was filed with the Office of the Secretary of State of the State of Florida on February 1, 1972, and the same was also filed in the Offices of the Department of State of the State of Delaware on February 2, 1972, and a Certificate as to the merger was filed in the public records of Escambia County, Florida, on February 11, 1972, and said Agreement was also filed with the Recorder of Deeds in Delaware on February 2, 1972.

In connection with the Agreement of Merger, each of the Maple Leaf shareholders, including Jack D. Kelly, executed, sealed and delivered a General Release dated January 28, 1972.

On or about November 14, 1977, the Barnett Bank of Pensacola, formerly the First Bank & Trust Company of Pensacola, executed and delivered a Special Warranty Deed to Tree Farm as to the property therein described which purports to be the Rosemont Subdivision and the First Addition thereto. Defendant, Jack D. Kelly, has filed numerous documents in the public records of Escambia County, Florida, wherein he claims to be the owner of some or all of the acreage and subdivision property. Tree Farm filed this suit on January 22, 1991, seeking to quiet title to all of the acreage and subdivision property owned by Tree Farm.

Prior to the quiet title suit being filed, Kelly filed suit in Leon County, Florida, in September of 1990, wherein the relief sought was vacation of the merger. An order was entered in Leon County transferring the case to Escambia County, which order was appealed by Kelly to the First District Court of Appeal, the Florida Supreme Court, and the United States Supreme Court, each court ruling against Kelly. In 1990, Kelly also filed suit against Tree Farm in the form of a "Petition to Implement Protective Measures". An order was entered in September 30, 1992, consolidating said action with this quiet title action, which order was also appealed by Kelly to the First District Court of Appeal and the Florida Supreme Court, resulting in decisions adverse to Kelly. On September 29, 1993, an order was entered consolidating the two suits instituted by Kelly with the quiet title suit instituted by Tree Farm, which order Kelly also appealed to the First District Court of Appeal which dismissed the same and the Florida Supreme Court denied Kelly's petition for review. The issues presented in all three cases are identical in nature and the decision made herein shall be dispositive of all such issues.

Kelly, individually, and as President of Maple Leaf, along with the other stockholders of Maple Leaf signed the Agreement and Plan of Reorganization and Kelly, as president of Maple Leaf, along with the Secretary, Emory O. Williams, Jr., also signed the Agreement of Merger. Further, Defendant released any claim he had to his shares or any other interest he may have in and to Maple Leaf to Tree Farm.

According to the corporation laws of both Delaware and Florida, the merger became effective on February 2,

1972, and Maple Leaf ceased to exist and Tree Farm was the owner of all property previously owned by Maple Leaf. The numerous documents or claims filed by Kelly in the public records of Escambia County might be construed to be clouds on the title of the real property now owned by Tree Farm and therefore Tree Farm is entitled to bring this quiet title action.

There is no contention that Kelly claims adverse possession inasmuch as he is not in possession of the property nor has he ever been in possession of the property nor has Kelly paid the ad valorem taxes on said property since said property was acquired by Tree Farm in February of 1972. The Notice of Lis Pendens dated May 7, 1979, and the numerous affidavits or documents do not cite any legal or factual basis upon which Kelly can properly assert any claim of title to the property in question and, furthermore, all of the aforesaid have now become moot and unenforceable as a matter of law inasmuch as Kelly did not institute any action within one year of filing of each of the aforesaid documents.

Further, Kelly should not now be permitted to institute a claim that the merger was never completed inasmuch as he has received the fruits thereof. Further, Kelly should be barred by the equitable doctrines of estoppel and laches since he waited over eighteen and one-half years before instituting suit to vacate or have declared illegal the merger. Further, pursuant to F.S. 95.11(3)(p) any suit with regard to matters surrounding the merger should have been brought within five years of discovery by Kelly of facts giving rise to a defective merger. In this regard, Kelly himself has documented his knowledge of the existence of such a prospective claim inasmuch as it is

clear that as of January 17, 1979, Kelly was advised by the Honorable Curtis Golden, State Attorney, First Judicial Circuit of Florida, that a grand jury has considered his various allegations and had determined that there was no basis for any kind of criminal action arising out of the merger. In said correspondence from Mr. Golden, Kelly was further advised that his grievances, if any, were civil and not criminal in nature.

It appears further that Kelly has made claim that a fraud was practiced upon him by the other shareholders of Maple Leaf, particularly Emory O. Williams, Jr. and George G. Phillips, Jr. F.S. 95.11 provides that a legal or equitable action founded on fraud shall be commenced within four years. Because of some changes in 1975 with respect to the statute of limitations in existence in 1972, it appears that actions grounded upon fraud must be, in any event, instituted within twelve years after the date of the commission of alleged fraud, regardless of the date the fraud was or should have been discovered. Initially, it should be noted that Kelly has not plead claims of misrepresentation and fraud with the particularity required by Florida law. However, even if properly plead, any action on fraud is barred if filed later than February 3, 1984. As indicated, Kelly's action was first commenced in 1990.

In summary, Kelly's claim is barred because he was not seized or possessed of the property within seven years prior to the commencement of his action. Any liens or claims filed by Kelly prior to the filing of his first suit in 1990 have been time-barred. The doctrines of laches and estoppel are a bar to Kelly's claim inasmuch as he did not act promptly in judicially asserting the invalidity

of the merger. Also, an examination of all of the agreements entered into between Maple Leaf and Tree Farm clearly indicate that Kelly was in agreement therewith, signed all of the necessary documents, and realized the fruits of the merger. An examination of Kelly's counterclaim and affirmative defense will readily show that the claims made therein are insufficient as a matter of law. It is therefore

ORDERED AND ADJUDGED that motion of Plaintiff, TREE FARM DEVELOPMENT CORPORATION, for summary judgment, be, and the same is hereby granted. That Kelly's counterclaim and affirmative defenses be, and the same are hereby dismissed. That counsel for Plaintiff shall prepare an appropriate summary final judgment quieting title in Plaintiff in and to the property described in the complaint filed herein.

DONE AND ORDERED at Pensacola, Escambia County, Florida, this 3rd day of June, 1994.

/s/ Joseph Q. Tarbuck
JOSEPH Q. TARBUCK,
CIRCUIT JUDGE

Conformed copies to:

Philip A. Bates, Esq.

John Kevin Griffin, Esq.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 13, 1992

Mr. Dennis K. Larry
125 West Romana St.
P.O. Box 13010
Pensecola [sic], FL 32591-3010

Re: Jack David Kelly, etc.
v. Tree Farm Development Corporation, et al.
No. 92-327

Dear Mr. Larry:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk